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PP v. NG KWAN HUA

HIGH COURT MALAYA, MELAKA
ZULKIFLI BAKAR J
[CRIMINAL TRIAL NO: 45B-04-2012]
19 FEBRUARY 2016

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CRIMINAL LAW: *Murder – Defence – Accused suffered from psychotic depression – Whether accused mentally fit to stand trial – Whether prima facie case established – Whether trial could proceed – Whether there could be fair trial – Penal Code, ss. 300 & 302 – Criminal Procedure Code, s. 344(3)*

C

CRIMINAL LAW: *Offences – Grievous hurt – Accused slit victim's throat and stabbed her chest – Whether victim suffered grievous injury – Whether victim's life endangered – Accused suffered from psychotic depression – Whether accused mentally fit to stand trial – Whether prima facie case established – Whether trial could proceed – Whether there could be fair trial – Penal Code, ss. 320(h) & 326 – Criminal Procedure Code, s. 344(3)*

D

EVIDENCE: *Dying declaration – Admissibility – Accused charged for murder and voluntarily causing grievous hurt – Dying declaration of deceased pointed to accused as perpetrator – Whether dying declaration must be corroborated – Whether admissible as evidence – Whether prima facie case successfully established*

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The accused was a regular visitor of one Lim Mui Tian's ('PW9') house. On one eventful visit, PW9 told the accused to leave but the latter refused and retaliated by hitting PW9's head and slitting her neck with a knife. He then proceeded to the living room where PW9's mother ('the deceased') was. PW9 saw the accused bending over the deceased who was lying down on a mattress on the floor. The accused stood up and advanced towards PW9, stabbing her in the chest. At that moment, PW9 saw a pool of blood surrounding the deceased's body. PW9 pushed the accused from her to the kitchen door and immediately locked the door knob. She then telephoned her brother ('PW7') for help. When PW7 arrived, he asked the deceased what had happened. Before succumbing to her injuries, the deceased told PW7 (in Teowchew dialect) 'Anak Apek bunuh saya' and 'Dia suruh adik kamu ikut dia, adik kamu tidak mahu ikut dia, dia nak bunuh saya', referring to the accused. The accused was charged under ss. 302 and 326 of Penal Code ('the Code') for the murder of the deceased ('the first charge') and voluntarily causing grievous hurt by a dangerous weapon to PW9 ('the second charge'), respectively. However, the prosecution opted to apply s. 300(c) of the Code to prove the case against the accused for the first charge. Satisfied that *prima facie* case had been made out against the accused at the close of the prosecution's case for both charges, the accused was called to enter defence. The defence submitted that the accused lacked mental fitness to stand trial because he suffered from psychotic depression, as evinced by a medical report.

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Held (ordering accused to be kept in safe custody at mental hospital):

(1) The dying declaration evidence was adduced through PW7 and PW9 whom were children of the deceased. Even without the evidence of dying declaration, the prosecution had successfully established a *prima facie* case for the first charge. PW9 saw the accused sitting beside the deceased on the mattress whilst the deceased's body was surrounded by a pool of blood. This evidence was sufficient to conclude that it was the accused who had inflicted the said wound on the deceased and the wounds, in its ordinary course of nature, had caused the deceased's death under s. 300(c) of the Code. (paras 20, 22 & 23)

(2) The injury suffered by PW9 was grievous as it endangered PW9's life, as provided under s. 320(h) of the Code. The injury was inflicted voluntarily. After examination, the knife was found to have blood specimens of PW9, along with that of the deceased. A *prima facie* case had been made out against the accused at the close of the prosecution's case after undertaking a maximum evaluation of the credibility and reliability of such evidence for the second charge. (paras 25-28)

(3) The charges against the accused were serious offences. The court is a place for the victim, victim's family members as well as the accused to seek justice. There could not be a fair trial if the trial was ordered to proceed. The accused was ordered to be kept in safe custody at Hospital Permai, Johor under s. 344(3) of the Criminal Procedure Code and pending order to be made by the Ruler of the accused to be confined in the said mental hospital. Once the accused is found to be capable to stand trial and make his defence, the accused shall be released from the place where he is confined and be brought to the trial court for the resumption of the trial. (paras 34, 35 & 36)

Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Balan Subramaniam Ponnudurai v. PP [2014] 1 LNS 361 CA ***(refd)***
Berg v. DPP (Qld) [2015] QCA 196 ***(refd)***
Goi Ching Ang v. PP [1999] 1 CLJ 829 FC ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Ooi Choo Hock v. PP [2014] 3 CLJ 239 CA ***(refd)***
PP v. Alsarip Ambong [2015] 5 CLJ 138 HC ***(refd)***
PP v. Azilah Hadri & Anor [2015] 1 CLJ 579 FC ***(refd)***
PP v. Lin Lian Chen [1990] 2 CLJ 1020; [1990] 2 CLJ (Rep) 746 HC ***(refd)***
PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC ***(refd)***
PP v. Zainal Abidin Mohd Zaid [1993] 1 CLJ 147 HC ***(refd)***
Ray Solis v. PP [2015] 3 CLJ 215 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 342(3), 343(3), 344(3), 345, 349, 352(b)
Evidence Act 1950, s. 27
Penal Code, ss. 300(c), 302, 320(h), 326

A *For the prosecution - Nurfarhana Ahmad, DPP; State Legal Advisor's Office, Melaka*
For the defendant - Rajindar Singh Gurbachan Singh; M/s Morthi, Segaran & Co

Reported by Najib Tamby

B **JUDGMENT**

Zulkifli Bakar J:

Introduction

[1] The accused was charged with offences of murder of one Ah Ngo
C under s. 302 of the Penal Code and of voluntarily causing grievous hurt by a dangerous weapon under s. 326 of the Penal Code to one Lim Mui Tian.

[2] The charges against the accused read as follows:

First Charge

D Bahawa kamu pada 1.7.2011 jam lebih kurang 11.40 malam di dalam sebuah rumah yang beralamat di No. 9554, Batu 10, Kg. Air Salak, Bukit Rambai Batang Tiga, di dalam daerah Melaka Tengah, di dalam Negeri Melaka telah melakukan kesalahan bunuh dengan menyebabkan kematian terhadap seorang perempuan bernama Ah Ngo (No. K/P: 360529-04-5030), dan oleh yang demikian kamu telah melakukan satu
E kesalahan di bawah seksyen 302 Kanun Keseksaan dan boleh dihukum di bawah seksyen yang sama.

Second Charge

Bahawa kamu pada 1.7.2011 jam lebih kurang 11.35 malam di dalam sebuah rumah yang beralamat di No. 9554, Batu 10, Kg. Air Salak, Bukit
F Rambai Batang Tiga, di dalam daerah Melaka Tengah, di dalam Negeri Melaka telah menyebabkan cedera parah kepada seorang perempuan bernama LIM MUI TIAN (NO. K/P: 791110-04-5028), dengan menggunakan pisau iaitu senjata yang boleh menyebabkan kematian. Oleh yang demikian itu kamu telah melakukan suatu kesalahan yang
G boleh dihukum di bawah seksyen 326 Kanun Keseksaan.

The Facts

[3] On 1 July 2011 at around 7pm, Lim Mui Tian (PW9) came back from work and stayed at home with her mother, Ah Ngo (deceased) and her 21 months old daughter.

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[4] The accused is a regular visitor to PW9's house. On the fateful day, the accused visited PW9 after he went to his mother's house, which is situated at the same village.

[5] At about 9pm, after completing her laundry jobs, PW9 went into the
I house and sat at a place to access internet while the accused took a chair and sat beside PW9.

[6] PW9 had requested the accused to go home but the accused remain unresponsive. Until around 11pm, PW9 stopped to access internet as she was in fact waiting to chat with her husband who went abroad in Vietnam for working purpose. The deal between PW9 and her husband was that her husband would not go online after 11pm. After that, PW9 asked the accused to go back because she was getting ready to go to sleep.

[7] However, the accused followed PW9 to wherever she goes. PW9 could not stand this any longer and told the accused to stop disturbing her life again because people residing around had asked the deceased about the relationship between PW9 and the accused since the accused always visited PW9 regularly at least once a week and PW9 is a married woman.

[8] PW9 initially closed the inside door of the kitchen after the accused went out from her house. When PW9 opened the door in order to lock the outside grill door, the accused obstructed with his leg. The accused hit PW9's head at its left side. When PW9 looked back, she saw the accused taking out a knife and used the knife to slit her neck for two times.

[9] PW9 was pushed by the accused and she fell onto the floor nearby the kitchen door. At that material time, she screamed the deceased's name for help. Then, the accused passed by PW9 and went into the living room where the deceased was.

[10] Subsequently, PW9 with the injuries stood up and moved to the living room (at point 9 of the sketch plan (P60)), and from the corridor between room no. 3 and room no. 5 she saw the accused was bending from the rear of the head of the deceased. The deceased was seen by PW9 lying down on the mattress on the floor holding her bleeding neck. After a while, the accused stood up from where he was and moved towards PW9 with the knife. At that moment, PW9 saw the deceased's body was in a pool of blood.

[11] The accused then attacked PW9 with the knife. PW9 avoided stab from the accused and the knife dropped from the accused's hand. However, the accused picked up the knife and stabbed PW9 on the right chest.

[12] PW9 heard her daughter's cries and with the energy left, she pushed away the accused from her to the kitchen door. PW9 immediately locked the door knob.

[13] After that, PW9 went to take a phone at point 15 (blue cupboard) and made a call to her brother named Lim Ah Lai (PW7) to ask for assistance and informed him that the accused intended to kill her and the deceased. After making the call, PW9 went into to the living room and lay down beside the deceased on the mattress and she asked the deceased to endure it until the arrival of PW7.

[14] After receiving the call from PW9, PW7 without any delay drove to his mother's house at Air Salak. During the journey, PW7 had called the police hotline to report this matter. PW7 and the police met at a church. PW7 then brought the police to his mother's house.

[15] PW7 approached the deceased and asked her what had happened. The deceased replied PW7 in Teowchew dialect that "Anak Apek bunuh saya" referring to the accused, which was heard by PW9.

(i) Further, PW7 asked the deceased why did he do so and the deceased answered:

> Saya tanya dia kenapa dia nak bunuh kamu. Ibu saya jawab dia suruh adik kamu ikut dia, adik kamu tidak mahu ikut dia, dia nak bunuh saya.

[16] PW7 then carried PW9's daughter to his car after he found her at room no. 4. At around 1am, the ambulance arrived. PW9 and the deceased were taken to Hospital Besar Melaka.

Prosecution's Case

[17] The prosecution called 28 witnesses for its case.

First Charge

[18] The prosecution opted to apply s. 300(c) of the Penal Code to prove the case against the accused for the first charge.

[19] According to Dr Mohamad Azaini bin Ibrahim (PW12), a pathologist who conducted the post mortem examination on the body of the deceased, had certified that she died mainly due to the stab wounds on the chest. The report of post mortem was tendered as P71. The main two fatal injuries were the stabs inflicted on the left lungs of the deceased.

[20] In this context, the prosecution submitted that at that material time, there was only the accused who was present at the scene apart from PW9, PW9's daughter and the deceased. Also, based on PW9's evidence, she saw that the accused was sitting beside the deceased on the mattress whilst the deceased's body was surrounded by pool of blood. These available evidence are, in my judgment, are sufficient to conclude that it was the accused who had inflicted the said wounds on the deceased and the wounds were in the ordinary course of nature had caused death to the deceased as enunciated under s. 300(c) of the Penal Code. In the case of *PP v. Alsarip Ambong* [2015] 5 CLJ 138, which is somewhat has similar facts held as follows:

> That The Accused Had Inflicted The Said Stab Wounds
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> [20] The evidence to support the crucial element of the offence that the accused stabbed the deceased came from PW2. I have summarised her evidence earlier and as can be noted, PW2 did not actually see the accused stabbing the deceased. However, the inferential evidence

irresistibly points to the conclusion that it was the accused and no other person had stabbed the deceased twice in the chest on that fateful morning. PW2 told the court that she came to the living room to dress up her children. The deceased who is her brother was lying down in the living room. Apart from her, the deceased and her children, the only other person who present was the accused. The accused is her first cousin therefore his identity is not in doubt ...

[21] Information leading to discovery under s. 27 of the Evidence Act 1950 were supplied by the accused, according to ASP Stephen ak Ayuk (PW25), as below:

(i) when conducting interrogation on the accused, PW25 told the court that the accused had said these to him, as detailed in his report (P85):

> Itu perempuan Cina yang saya bunuh dan pakaian yang saya pakai pada masa kejadian dan pisau yang digunakan saya sudah buang di kawasan berdekatan rumah dan saya boleh tunjukkan di mana.

(ii) in the instant fact, application was made by both parties to exclude statement of the accused about killing PW9 and the deceased. In order to preserve fairness to the accused's right for trial as decided in the Federal Court case of *Goi Ching Ang v. PP* [1999] 1 CLJ 829; [1999] 1 MLJ 507, I exercised my discretion to exclude such statement made by the accused. The fairness principle was held in *Goi Ching Ang's* case (*supra*) as:

> Fairness requires fair trial which, in turn, needs fair procedure. Fair process requires that the legitimate interests of both the prosecution and the defence are adequately provided for. While the police ought to be given a reasonable opportunity to question suspects and accused persons, in its investigation, the accused must also be reasonably protected from the danger of extraction of unreliable statements and of statements (even if reliable) by some improper means. Evidence obtained in an oppressive manner by force or against the wishes of an accused person or by trick or by conduct of which the police ought not to take advantage, would operate unfairly against the accused and should in the discretion of the court be rejected for admission. The court should ensure that the standards of propriety in obtaining s. 27 information are scrupulously followed in the police station.

(iii) nevertheless with regards to the knife (P46B), it was found with the aid of the accused who led the police team to its discovery and this evidence is admissible;

(iv) as evidenced by chemist report (P73), it was confirmed that the said knife was filled with blood specimens of both the deceased and PW9 after being analysed;

(v) this court would at first assess this discovery using the tests as held in the Federal Court case of *PP v. Azilah Hadri & Anor* [2015] 1 CLJ 579; [2015] 1 MLJ 617:

> [75] We are of the considered view that the correct test was applied in *Public Prosecutor v. Krishna Rao a/l Gurumurthi & Ors* [2000] 1 MLJ 274, as applied in *Chong Soon Koy v. Public Prosecutor* [1977] 2 MLJ 78 when Suffian LP formulated a two questions test, *viz*:
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> (a) what was the fact discovered?; and
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> (b) what was the information supplied by the accused relating distinctly to the facts thereby discovered?
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> [76] The above two questions tests indicate that the focus is on the supplied fact discovered and not on the extraneous factors to make the information acceptable. Applying the above test to the current case, (as opposed to the first respondent's position), the prosecution's version was that PW20 and PW21 were taken by him to the scene. The first respondent never mentioned the word 'Puncak Alam' to PW20 and PW21 but had merely brought them to that location. The act of the first respondent pointing to the place where the deceased's remains were found amounted to information. That information was the distinct cause of the discovery of the remains of the deceased before the second respondent arrived with another set of officers. We observed that nowhere was it shown or established by the first respondent that the police already knew the exact location.
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> [77] Having considered the evidence of PW19, PW20, PW21, PW75 and PW58 we are satisfied that the police did not know the exact location of the scene of crime had it not been pointed out by the respondents. The second respondent's conduct of leading the police to the same scene of crime at Puncak Alam, separately and independently, merely strengthened the prosecution's case against the respondents. PW19 testified that he received information from PW75 that the second respondent had also agreed to show the location of the crime scene. And the second respondent brought the police to the same location as shown by the first respondent.

(vi) based on the above and taking into account all reasonable circumstances as adduced in the evidence, this court is satisfied that the police did not have any knowledge about the place where the knife was thrown and it was later proved to have direct link with the two victims of this case. The usage of this evidence would not have caused adverse effect on the fairness of the trial proceedings of the accused. In the interest of justice, it is justified for the admissibility of the evidence for the discovery of this exhibit (P46B). I found that the probative value of this evidence overrides the prejudice effect towards the accused.

[22] Further, there is also evidence of dying declaration by the deceased to PW7 which is admissible to the satisfaction of this court:

(i) in deciding so, I am guided by the Court of Appeal's decision in the case of *Balan Subramaniam Ponnudurai v. PP* [2014] 1 LNS 361; [2014] 4 MLJ 331 as held:

> [20] The learned counsel's argument that no medical certificate was produced to admit dying declaration in reliance of Indian cases is not part of our jurisprudence or law. India has some provisions to deal with such issues but in our jurisprudence, the EA 1950 is the sole guideline, and the admissibility issue is related to s. 32(1)(a) and nothing more. What is important in admitting or relying on dying declaration is that the court must be careful to ensure that the statement is not fabricated or concocted, tutored or tailored etc; more so when conviction is going to be based on the dying declaration itself. Further, the court must ensure that the statement, whether oral or reduced into writing must accurately represent what the deceased has said (see *Naranjan Singh v. Public Prosecutor* [1949] 1 MLJ 122).

(ii) moreover, this court is also guided by the Court of Appeal case of *Ray Solis v. PP* [2015] 3 CLJ 215; [2015] 2 MLJ 815 as follows:

> [37] It has been accepted in our law that the scope of that provision is wider than the common law rule where a 'dying declaration' must relate exclusively as to the cause of the death itself. In our law, the statement in question may relate to the cause of his death or as to any of the circumstances of the transaction which resulted in this death; such statement should however not be remote in point of time.
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> In *Evidence Practice and Procedure* by Augustine Paul (3rd Edn), (at page 329) the learned author (and a former Judge of the Federal Court) has instructively noted as follows:
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> > … it is to be borne in mind that the local law as to dying declarations is materially different from the law in England. By section 32 of the Evidence (Ordinance) statements by a deceased person as to the circumstances of the transaction which resulted in his death are admissible irrespective of whether the person who made them was or was not at the time when they were made under expectation of death.
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> [38] It is also the law here that such a dying declaration or statement need not be corroborated by some other evidence. The same learned commentator in *Evidence, Practice and Procedure* above cited, goes on at page 335 to state:
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> A dying declaration does not need corroboration.
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> > In *Nembhard v. R* [1982] 1 All ER 183, the Privy Council rejected an argument that a dying declaration must be corroborated if it is to be relied on. In *State Of Uttar Pradesh*

A *v. Chet Ram & Ors* [1990] 1 CLJ 1079 the Indian Supreme Court said that a dying declaration, needless to say, does not require any corroboration as in the case of the evidence of an accomplice or a confession. However, where the deceased who made the dying declaration is an accomplice then corroboration of his evidence is desirable and
B necessary (See Hill JA in *Mary Shim v. PP* (1962) MLJ 132, 134 CA).

(iii) hence, in essence, it is the duty of this court to evaluate whether there is reasonable basis for the dying declaration made is without fabrication. The dying declaration evidence is adduced through PW7 and PW9
C whom are children of the deceased. Although the said evidence is admissible being dying declaration of the deceased, this court had considered other evidence which is in fact corroborative in nature although corroboration is not required. As in this case, Encik Mohd Shahryelzan bin Abu Talib (PW21), an assistant to Medical Officer at
D Klinik Kesihatan Cheng who arrived at the scene testified the deceased was still conscious though she had suffered loss of blood. Not only this, it was confirmed by Dr Mohamad Azaini bin Ibrahim (PW12) that the deceased was still able to talk since the wound inflicted on the side of her neck did not affect her vocal cord. It is trite law that corroboration
E is required in the case of dying declaration if the deceased who made the dying declaration is an accomplice. The deceased in this case is not an accomplice hence corroboration of her dying declaration evidence is unnecessary; and

(iv) in this case, the dying declaration of the deceased to PW7 is not the only
F evidence available and the decision is not based solely on the said evidence of dying declaration.

[23] With the evidence available, even without the evidence of dying declaration, this court is satisfied that the prosecution had successfully established a *prima facie* case against the accused after assessing all
G prosecution evidence upon maximum evaluation (*Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734) for the first charge.

Second Charge

[24] Dr Suhaib bin Mohd Amin (PW10), who examined PW9 at Hospital
H Melaka found that PW9 was stabbed at her chest, hand, neck with a cut of 10cm. PW10 at that time had captured photos of those injuries inflicted on PW9 with his i-Phone and the photos were tendered as P66A-C.

[25] Dr Muhamad Kamil bin Abdul Wahab (PW28) also certified that the stab wounds on the right chest with 5 x 4cm and the depth of at least
I 2.5cm were the result of stab from the direction of front above to below with the possibility of both, the assailant and the victim, were standing. PW28 explained that this stab wound on her chest into her lungs and her pleural

cavity had caused pneumothorax which occurred when air leaked into the space between her lung and chest wall, causing collapse of lungs and PW9 would suffer difficulty in breathing. This lung and airway disorder could risk PW9's life.

(i) for this injury, PW9 was treated by PW28 with a chest tube was inserted into the space around the lungs to drain the air so that to allow the lungs to re-expand; and

(ii) the injury suffered by PW9 is "grievous" as it endangered PW9's life which might cause suffocation as provided under s. 320(h) of the Penal Code which stated:

> (h) any hurt which endangers life, or which causes the sufferer to be, during the space of twenty days, in severe bodily pain, or unable to follow his ordinary pursuits.

[26] Further, the facts that were admitted by PW9 when cross-examined by the defence counsel had strengthened the fact that the accused had voluntarily causing grievous hurt on PW9 as follows:

(i) in year 2007, PW9 was married;

(ii) when PW9 was 16 years old, the accused declared his love towards her but it was thought as a joke by PW9 and there was no love relationship between them;

(iii) PW9 never stop or restrict the accused from coming to her house as he did regularly;

(iv) PW9, in year 2011, had hugged and kissed with the accused in her house which was unknown to her husband; and

(v) PW9 told the accused that she would be going to Vietnam soon and asked the accused not to disturb her life.

[27] It is observed that, the knife (P46B) after examination found to have blood specimens of PW9 and using the said knife to cause the wounds according to PW28 would have caused difficulty to breath due to pneumothorax.

[28] These evidence as adduced by prosecution, if unrebutted, are sufficient for this court to believe in the existence of the facts stated in the charge. Therefore, a *prima facie* case has been made out against the accused at the close of prosecution's case after undertaking a maximum evaluation of the credibility and reliability of such evidence (*Balachandran v. PP* [2005] 1 CLJ 85) for the second charge.

Mental State Of The Accused

[29] After the defence of the accused was called on both charges, this court is satisfied that it is reasonable to believe that the accused is incapable of making his defence. It is because:

(i) before this trial commence, this court had to postpone the trial and ordered him to be sent for a period of not exceeding one month for observation in Hospital Permai, Johor under s. 342(3) of the Criminal Procedure Code pending a medical report of a certified medical doctor. A report was furnished to this court. This was the first medical report (P95) stating the accused was fit for trial. It was also remarked that the accused was a person who could not control his temper and behave impulsively when he was angry; and

(ii) during the trial, the defence counsel had put this to PW9 when cross-examining her. PW9 admitted that she had asked the accused to stop disturbing her, in other words, PW9 had decided to discontinue any relationship with the accused. Certainly, this had caused the accused to be disappointed and angry and behave impulsively. This was properly done and allowed by the law as manifested in the Court of Appeal case of *Ooi Choo Hock v. PP* [2014] 3 CLJ 239:

> It is trite law that the defence is entitled, through cross-examination of the prosecution witnesses, to put its case at the earliest possible stage. The defence is entitled, as of right, to elicit oral as well as documentary evidence by way of cross-examination of the witnesses for the prosecution in order to either destroy the case for the prosecution or to support its own case.

(See also *PP v. Lin Lian Chen* [1990] 2 CLJ 1020; [1990] 2 CLJ (Rep) 746; [1991] 1 MLJ 316 / *PP v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285; [1992] 2 MLJ 561).

[30] Nonetheless, at the close of prosecution's case, and upon request of the defence, the accused was sent again to Hospital Permai, Johor for observation as it was contended that the accused is unfit to conduct his defence. The second medical report was received and tendered as D97.

(i) the defence counsel read out D97 to the court as follows:

> Hasil daripada pemerhatian rapi 24 jam dan pemeriksaan mental berkala yang dilakukan sepanjang penama berada di hospital ini serta meneliti rekod kemasukan terdahulu menunjukkan penama menghidap penyakit kemurungan major dengan gejala-gejala psikosis Major Depressive Disorder with Psychotic Features. Penama telah diberikan rawatan ubat-ubatan untuk penyakit kemurungan dan psikosis yang dialaminya.
>
> Keadaan mental Penama masih tidak stabil pada tarikh surat ini ditulis, Yang Arif. Penama masih tidak layak untuk memberi pengakuan di Mahkamah bagi tujuan pembelaan diri pada tarikh surat ini ditulis, Yang Arif.

(ii) therefore, the defence counsel applied to this court to consider s. 344(3) of the Criminal Procedure Code and that the accused may be committed to a psychiatric hospital for safe custody pending the order of the Ruler.

[31] As held in High Court case of *PP v. Zainal Abidin Mohd Zaid* [1993] 1 CLJ 147, the certificate is receivable as evidence under s. 343(3) of the Criminal Procedure Code. Therefore, D97 which stated that the accused is unfit to plead and to attend trial in court makes this court to decide to report this case to the Ruler of the State, and the Ruler may, in his discretion, order the accused to be confined in a psychiatric hospital since this offence charged is not bailable.

[32] The matter does not end here. This court after making the order under s. 344(3) of the Criminal Procedure Code, acknowledged the fact that the accused who is confined in the psychiatric hospital would be produced before the trial court again when the visitors and medical director thereof jointly certify that in their opinions that the accused is capable of making his defence. "Visitors" is defined under s. 352(b) of the Criminal Procedure Code as:

> (b) "Visitors" means the members of the Board of Visitors appointed under section 38 of the Mental Health Act 2001 and for the time being acting under section 40 of that Act.

[33] Subsequent to that, after the accused is certified that he is capable of making his defence and fit for trial, the accused would be ordered to be released from the place of his detention and be brought before the trial court to resume the trial at the stage of hearing his defence as provided under s. 345 of the Criminal Procedure Code. When the trial proceeds, s. 342 of the Criminal Procedure Code will come into play again and the trial court will have to consider whether the offence was committed by the accused as a person of unsound mind or otherwise.

Conclusion

[34] D97 had clearly stated that the accused had psychotic depression. This court had drawn its attention to the fairness of the trial and not to cause injustice to the accused by making the order for the accused to be sent to Hospital Permai for safe custody pending the order of the Ruler.

(i) it is emphasised that this court relied on D97 submitted by defence counsel in deciding that the accused is lacked of mental fitness to stand trial for the purpose of presenting his defence on the charges prepared against him;

(ii) as a guide, I refer to the Supreme Court of Queensland – Court of Appeal case of *Berg v. DPP* (Qld) [2015] QCA 196 which said as follows:

> [36] Although the learned trial judge stated that "[a]t common law fitness to plead and fitness to stand trial were regarded as the same thing", that was historically not the case. The terms are now used, although perhaps erroneously, interchangeably. The terms relate to the timing of the question for fitness and the procedures that ensue dependent on that timing. Fitness to plead was a

A preliminary threshold test that included the requirement to understand the nature of the charge(s) so as to be able to plead, to communicate his or her plea, and understand generally the nature of the proceeding that was about to be commenced. Fitness to be tried focused on a defendant's understanding and following of the trial so as to be able to make a proper defence. That is, in
B both cases, a defendant's comprehension of the proceeding was of importance for a fair trial. As the law developed, the focus appeared to be whether a defendant was fit to plead and to stand his or her trial and, as a consequence, the two concepts merged. Ultimately, it appears that fitness to plead, as it developed,
C incorporated all aspects of fitness for trial.

[37] The seminal Australian case on fitness to plead and be tried is that of Presser. The apt cited passage, based on the jury direction of Alderson B in *Pritchard*, is as follows:

> D [The test] needs, I think, to be applied in a reasonable and common sense fashion. And the question, I consider, is whether the accused, because of mental defect, fails to come up to certain minimum standards which he needs to equal before he can be tried without unfairness or injustice to him.
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> E He needs, I think, to be able to understand what it is that he is charged with. He needs to be able to plead to the charge and to exercise his right of challenge. He needs to understand generally the nature of the proceeding, namely, that it is an inquiry as to whether he did what he is charged with. He needs to be able to follow the course of the
> F proceedings so as to understand what is going on in court in a general sense, though he need not, of course, understand the purpose of all the various court formalities. He needs to be able to understand, I think, the substantial effect of any evidence that may be given against him; and he needs to be able to make his defence or answer to the
> G charge. Where he has counsel he needs to be able to do this through his counsel by giving any necessary instructions and by letting his counsel know what his version of the facts is and, if necessary, telling the court what it is. He need not, of course, be conversant with court procedure and he need not have the mental capacity to
> H make an able defence; but he must, I think, have sufficient capacity to be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his counsel, if any. (emphasis added)

(iii) in the circumstances, in the view of the fact that the accused do not have
I the capacity to stand trial *vis-a-vis* to make his defence and being unable to give instructions to his counsel have indeed prejudiced him and there

cannot be a fair trial if the trial is ordered to proceed. The charges against the accused is one of which carried serious offences, ie, sentenced to death for the first charge if found guilty and convicted. The court is a place for the victim, victim's family members as well as the accused to seek justice and it is our system of law that one is innocence until proven guilty.

[35] Accordingly, I ordered the accused to be kept in safe custody at Hospital Permai, Johor under s. 344(3) of the Criminal Procedure Code and pending the order to be made by the Ruler the accused to be confined in the said mental hospital. Thus, I shall report this case to the Ruler for the orders of His Royal Highness.

[36] Nevertheless, as the law requires, once the accused is found to be capable to stand trial and making his defence, the accused shall be released from the place where he is confined and brought forthwith to the trial court for resumption of the trial. In the circumstances, s. 349 and s. 345 of the Criminal Procedure Code are relevant provisions to be undertaken by the trial court subsequently.